A **BANK UTAMA (MALAYSIA) BHD**

v.

RINDAYA SDN BHD & ORS

B HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN J
[SUIT NO: 22-86-2000-II]
25 APRIL 2005

C ***CIVIL PROCEDURE:*** *Affidavits - Affidavit in opposition - Delay in filing - Application to extend time - Whether delay caused substantial miscarriage of justice - Whether extension to be allowed - Rules of the High Court 1980, O. 1A, O. 2 r. 3, O. 32 r. 13(2)(b)*

The plaintiff had filed a summons in chambers application to strike out
D the 1st and 2nd defendants' defence ('encl. 83'). The defendants sought to challenge encl. 83, but had not filed the affidavit in opposition within the time prescribed under the Rules of the High Court 1980 ('RHC'). Thereafter the defendants applied for an extension of time to file the affidavit ('the impugned affidavit'), but the deputy registrar ruled that the
E four months delay was inordinate and fatal, and hence dismissed the application. The defendants appealed and argued that extension of time ought to be allowed in the circumstances, as the delay had not occasioned any miscarriage of justice since the plaintiff could be compensated by cost and could still have their application for judgment
F heard. It was further argued that allowing the extension was in line with O. 1A and O. 2 r. 3 of the RHC and the decision in *Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan* [2002] 3 CLJ 686 *('Beauford')*. The plaintiff opposed the application contending that the defendants' non-compliance with O. 32 r. 13(2) RHC herein constituted a substantial miscarriage of justice. According to the plaintiff further, the defendants'
G reliance on *Beauford*'s case and O. 1A and O. 2 r. 3 RHC was misplaced, as the said case and order only dwelt on the point that preliminary objection ought not to be raised merely on the ground of non-compliance of the rules.

H **Held (allowing extension of time):**

(1) The authorities cited by the plaintiff pertaining to the need to comply with O. 32 r. 13(2)(b) of the RHC and the issue of the delay were all decided before the coming into force on 16 May 2002 of O. 1A and O. 2 r. 3 of the RHC which were provisions inserted
I by the Rules of the High Court (Amendment) 2002 (PU (A) 197/ 2002). (para 14)

(2) Order 1A and O. 2 r. 3 RHC ought not to be read in isolation. Order 1A, as it were, envisages a scenario where a judge, in being confronted with a situation of a technical non-compliance and an opposition thereto, ought to strike a balance between the need to do justice to the opposing party and the need for the applicant to comply with the provisions of the RHC. Order 2 r. 3, on the other hand, seems to complement O. 1A and provides the benchmark wherein the limit of non-compliance of the RHC by an applicant could be tolerated. (paras 16 & 17)

(3) The plaintiff's interpretation of O. 1A and O. 2 r. 3 of the RHC is too restrictive. Such an interpretation would militate against the grains of the legal provisions which, in the words of Low Hop Bing J in *Beauford*, were incorporated with the intention "to provide for smooth administration of the due process of litigation and the administration of justice by way of substantial merits of the case and not on merely procedural technical objections". (para 18)

(4) Admittedly the defendants had failed to comply with the requirement under O. 32 r. 13(2)(b) of the RHC which required them to file the impugned affidavit within 14 days from the date of service of encl. 83, *ie*, latest by 19 July 2003, thereby resulting in the delay. However, the defendants did file an application for extension of time three months later. The defendants had also filed the impugned affidavit which, *prima facie*, showed that the defendants were *bona fide* in opposing encl. 83. Weighing the situation, the court is of the view that the delay caused by the defendants has not seriously prejudiced the plaintiff to the extent of being irreparable or unable to be compensated by cost. Consequently, the impugned affidavit should be deemed to have been regularly filed and served. (paras 22 & 23)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Pasadena Properties Development Sdn Bhd & Ors [1990] 2 CLJ 961 HC ***(refd)***

Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan [2002] 3 CLJ 686 HC ***(refd)***

KS Chua & Co v. Chui Miang Chew & Ors [1996] 2 CLJ 676 HC ***(refd)***

Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 CA ***(refd)***

Ong Guan Teck & Ors v. Hijjas [1982] CLJ 31; [1982] CLJ (Rep) 616 HC ***(refd)***

Public Bank Bhd v. Heng Weng Chin & Ors [2002] 3 CLJ 751 HC ***(refd)***

Punca Klasik Sdn Bhd v. Seok Kim Leow [1996] 5 MLJ 241 ***(refd)***

Sarawak Electricity Supply Corporation & 3 Ors v. Kwan Choon Kiong [2003] 4 CLJ 381 HC ***(refd)***

United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin [2001] 2 CLJ 31 CA ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 1 r. 1, O. 1A, O. 2 r. 3, O. 32 r. 13(2)(b)

For the plaintiff - George Chapman; M/s Lim Tan & Partners
For the defendants - James Lo Kuin Chuan; M/s George Lo & Partners

Reported by Rose Aziz

JUDGMENT

Lau Bee Lan J:

Background

[1] The 1st and 2nd defendants have appealed against the decision of the learned deputy registrar given on 21 May 2004 dismissing the 1st and 2nd defendants' summons in chambers dated 28 October 2003 for extension of time to file and serve affidavit in opposition (encl. 170).

[2] By way of background and for clarity I shall refer to the following chronology of events drawn up by the plaintiff and which is not in dispute.

(a) 8 May 2002	–	Plaintiff filed summons in chambers supported Nigel Manjan's affidavit to strike out the 1st defendant's defence dated 22 August 2000 and 2nd defendant's defence dated 11 April 2002 (encl. 83).
		Plaintiff served unsealed copy of summons in chambers to strike out defences of 1st and 2nd defendants.
(b) 21 May 2002	–	1st and 2nd defendants filed summons in chambers to strike out Nigel Manjan's affidavit in support of plaintiff's summons in chambers to strike out the defences of the 1st and 2nd defendants (encl. 86).
(c) 22 May 2002	–	Plaintiff served sealed copy of summons in chamber to strike out defences of 1st and 2nd defendants.
(d) 19 March 2003	–	Learned deputy registrar ruled that 1st and 2nd defendants' summons to strike out Nigel Manjan's affidavit be dismissed with liberty to the 1st and 2nd defendants to file and

serve their affidavit in opposition to the plaintiff's summons to strike out the defences of the 1st and 2nd defendants within three months from 19 March 2003.

(e) 17 June 2003 – Plaintiff's advocate agreed to extend time for another month for the 1st and 2nd defendants to file to serve their affidavit in opposition till 19 July 2003. (see exh "W2")

(f) 27 November 2003 – 1st and 2nd defendants served 1st and 2nd defendants' affidavit in opposition affirmed by Dato' Tang Sing Kang on 24 November 2003.

(g) 28 October 2003 – 1st and 2nd defendants filed the defendants' summons (encl. 135) (hereinafter referred to as "the defendants' application").

[3] The defendants' application is essentially to seek for an order that:

(i) the 1st and 2nd defendants be granted an extension of time to file and serve the affidavit in opposition of the 1st and 2nd defendants affirmed by Dato' Tang Ting Kang on 24 November 2003 (exh. GL2) (hereinafter referred to as "the impugned affidavit in opposition") within one month from the date of the order or such other period of time which the court deems fit; and

(ii) costs to be paid to the plaintiff in any event.

[4] The defendants' application is supported by the affidavits of James Lo Kuin Chuan namely:

(a) Affidavit in support affirmed on 28 October 2003 (encl. 135) (hereinafter referred to as "the defendants' 1st affidavit");

(b) Supplementary affidavit in support affirmed on 27 November 2003 (encl. 140) (hereinafter referred to as "the defendants' 2nd affidavit"); and

(c) Affidavit in reply affirmed on 19 December 2003 (encl. 153) (hereinafter referred to as "the defendants' 3rd affidavit").

[5] The plaintiff opposed the defendants' application by filing the affidavit in opposition and 2nd affidavit in opposition of Wilfred Anak Bertson Jimbau affirmed on 21 November 2003 and 4 December 2003 respectively (encls. 138 and 148) (hereinafter referred to as "the plaintiff's 1st affidavit and plaintiff's 2nd affidavit").

A **Parties' Contentions and Court's Findings and Evaluation**

[6] The defendants conceded that there is delay. Nevertheless, learned counsel for the defendants, Mr. James Lo, submitted that he had given his explanation for delay in filing the impugned affidavit in opposition as he had been unable to coordinate with the 2nd defendant for the signing B of the impugned affidavit in opposition on one of his brief and irregular trip to Sarawak (see para 3 of defendants' 1st affidavit). Mr. Lo further submitted that the defendants' application is *bona fide* and is not a tactical manoeuvre to delay the hearing of encl. 83 as is evident by the filing and service on the plaintiff on 27 November 2003 of exh. GL2, the C impugned affidavit in opposition, which has been affirmed by the 2nd defendant on 24 November 2003 (see para 3 and 4 of defendant's 2nd affidavit). To bolster their argument, the defendants relied on O. 1A and O. 2 r. 3 of the Rules of the High Court 1980 ("the RHC") and the case of *Beauford Baru Sdn Bhd v. Gopala Krishnan VK Gopalan* D [2002] 3 CLJ 686 HC.

[7] The plaintiff opposed the defendants' application primarily on the ground that O. 32 r. 13(2)(b) of the RHC has mandatorily provided that the 1st and 2nd defendants have to file the impugned affidavit in opposition within 14 days from the date of service of encl. 83 ie, on E 19 July 2003 (as extended by agreement of the parties) (see para 4 of plaintiff's 2nd affidavit).

[8] In support the plaintiff cited several authorities namely:

F (1) *KS Chua & Co v. Chui Miang Chew & Ors* [1996] 2 CLJ 676 HC

(2) *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321 CA

(3) *Ong Guan Teck & Ors v. Hijjas* [1982] CLJ 31; [1982] CLJ (Rep) G 616 HC

(4) *Punca Klasik Sdn Bhd v. Seok Kim Leow* [1996] 5 MLJ 241

(5) *Public Bank Bhd v. Heng Weng Chin & Ors* [2002] 3 CLJ 751 HC

H **[9]** Learned counsel for the plaintiff, Mr. George Chapman, contended that following the cases of *Ong Guan Teck* and *Punca Klasik (supra)*, the court's exercise of discretion whether to grant extension of time or otherwise is to be guided by the following criteria:

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(a) there must be some material before the court to satisfactorily explain the delay; A

(b) length of time of delay is a factor to be considered; and

(c) costs to the other party.

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[10] Learned counsel for the plaintiff further submitted that the explanation proffered by the defendants as per para 3 and 4 of defendants' 1st affidavit is unacceptable. It is the plaintiff's contention that the defendants' advocates could have arranged for the impugned affidavit in opposition to be forwarded to the 2nd defendant while he was away and the omission was a ploy to delay the hearing and further no request for extension of time was made prior to 19 July 2003 (see para 5 of plaintiff's 1st affidavit). As to the length of time considered as inordinate delay, the plaintiff cited the case of *Asia Commercial Finance (M) Bhd v. Pasadena Properties Development Sdn Bhd & Ors* [1990] 2 CLJ 961 HC wherein his lordship Zakaria Yatim (as he then was) held that the explanation by the 2nd defendant therein in the absence of the 3rd defendant therein (2nd defendant's wife) because she had been in Australia with their children for 1 1/2 years is not a sufficient ground to grant the extension of time. The plaintiff also referred to *Public Bank*'s case where the court held the delay of one month was inordinate. C D E

[11] It was submitted by the plaintiff that in the present case there was a delay of four months if computated from 19 July 2003 till the date of affirmation and attestation of the impugned affidavit in opposition or 18 months if computated from the date of service of the sealed copy of encl. 83. F

[12] Mr. Lo had submitted that the authorities relied upon by Mr. Chapman were decided before the coming into force of O. 1A and O. 2 r. 3 of the RHC. Mr. Chapman however argued that the defendants' reliance on *Beauford*'s case and O. 1A and O. 2 r. 3 of the RHC is misplaced because the said case and the said order relate to the point when a counsel ought not to raise a preliminary objection only on the ground of non-compliance of the rules. Further, Mr. Chapman submitted in the present case the facts are from *Beauford* where there was a mistake by the counsel which caused a delay in the lodging of the appeal whereas what is important is that the defendants must give sufficient explanation for the delay. G H

[13] Mr. Lo counter argued by submitting that notwithstanding the absence of the words "preliminary objection" in O. 1A, the interpretation accorded to O. 1A and O. 2 r. 3 of the RHC by Mr. Chapman was too narrow. I will revert to this point hereafter. I

[14] It is not disputed that the authorities cited by Mr. Chapman pertaining to the need to comply with O. 32 r. 13(2)(b) of the RHC and the issue of delay were all decided before the coming into force on 16 May 2002 of O. 1A and O. 2 r. 3 of the RHC which were provisions inserted by the Rules of the High Court (Amendment) 2002 (PU (A) 197/2002).

[15] O. 1A of the RHC provides:

> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

O. 2 r. 3 of the RHC further provides:

> 3. A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

[16] Both of the abovesaid provisions were promulgated *vide* the same legislation and came into force on the same date. A scrutiny of the two provisions show that both the provisions ought not to be read in isolation; rather one provision aids or amplifies the other. Firstly, there are terms which are common to both provisions, that is:

(a) non-compliance;

(b) "rules herein" or "these rules" which by virtue of O. 1 r. l of the RHC refer to "the Rules of the High Court 1980"; and

(c) justice.

[17] Secondly, in my opinion, O. 1A envisages a scenario where when the judge is confronted with a situation of a technical non-compliance of the RHC by a party ("the applicant") and there is opposition therein ("the opposing party"), he has to strike a balance between the need to do justice to the opposing party in the particular case *vis-a-vis* the need by the applicant to comply with the provisions specified in the RHC. It is also my view that complementary to O. 1A, O. 2 r. 3 provides the benchmark wherein the limit of non-compliance of the RHC by the applicant can be tolerated ie, whether such non-compliance has occasioned a substantial miscarriage of justice to the opposing party.

[18] Premised on the aforesaid reasons, I am more inclined to agree with the submission of Mr. Lo that the plaintiff's interpretation of O. 1A and O. 2 r. 3 of the RHC is too restrictive. Such an interpretation would to my mind go against the grain of the intended

legal provisions which were incorporated with the intention "to provide for smooth administration of the due process of litigation and the administration of justice by way of substantial merits of the case and not on merely procedural technical objections." (per Low Hop Bing in *Beauford Baru Sdn. Bhd. v. Gopala Krishnan VK Gopalan* [2002] 3 CLJ 686 HC at p. 692 eg).

[19] At this juncture it would be opportune for me to refer to my judgment in *Sarawak Electricity Supply Corporation & 3 Ors v. Kwan Choon Kiong (suing as the administrator of the estate of Kwan Kim Ching, deceased)* [2003] 4 CLJ 381 HC wherein I had the occasion to consider the applicability of O. 1A and O. 2 r. 3 of the RHC in the context of an alternative argument raised by the respondent that he has been seriously prejudiced by the appellant's failure to comply with the RHC. The non-compliance alleged by the respondent in *Sarawak Electricity Supply Corporation*'s case was the failure of the appellant to file the memorandum of appeal within fourteen days from the date of service of Form 141 and no extension of time was applied for by the appellant to file it at a later date.

[20] In the course of my judgment, I had considered *Beauford*'s case wherein I had said, "In *Beauford*'s case there was "an application for extension of time to file a notice of appeal" and the issue was whether a solicitor's mistake in interpreting a provision of the law governing the time limit for filing a notice of appeal was a good and sufficient ground for granting an extension. The learned judge allowed the defendant's appeal against the decision of the magistrate refusing extension of time". In the said judgment I had also referred to *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* [2001] 2 CLJ 31 CA followed by *Beauford (supra)*, where the Court of Appeal overruled the preliminary objection that the appellant's notice of appeal was filed out of time was a mere technicality. I had stated that the Court of Appeal held that such procedural technical objection should not be allowed to obstruct the process of giving justice to the deserving. However it is to be noted that His Lordship Ahmad Fairuz (now Chief Justice Malaysia) in delivering judgment on this point had expressly said at p. 37 "The notice of appeal had been filed anyway".

[21] However I had distinguished the aforesaid two cases and I had found that the conduct of the appellant counsel in making no efforts to file an extension of time to serve the notice of appeal and file and serve the memorandum of appeal despite the opportunities available and the necessity of a memorandum of appeal as "non-compliance (which) has occasioned a substantial miscarriage of justice". It is noteworthy to bear

in mind that the case of *Ernest Cheong Yong Yin (supra)* was decided before the insertion of O. 1A and O. 2 r. 3 of the RHC, yet such was the judicial thinking then.

[22] Reverting to the factual matrix of the instant case, indeed the defendants ("the applicant") have failed to comply with the requirement under O. 32 r. 13(2)(b) of the RHC which requires them to file the impugned affidavit in opposition on the plaintiff within 14 days from the date of service of the encl. 83, the latest by 19 July 2003 (extended date mutually agreed by parties) and which resulted in the delay as per the period submitted by the plaintiff. The defendants should have applied for extension of time prior to 19 July 2003. No explanation was given as why it was not done. Be that as it may, the defendants did file an application for extension of time namely, the defendants' application about three months later. The defendants have also filed the impugned affidavit in opposition (exh. GL2) which *prima facie* show that the defendants are *bona fide* in opposing encl. 83, the merits of which is the subject of a separate hearing and the same has been served on the plaintiff on 27 November 2003.

[23] The issue now is whether the defendants' non-compliance of O. 32 r. 13(2)(b) of the RHC has occasioned a substantial miscarriage of justice to the plaintiff ("the opposing party"). The plaintiff submitted that there is a miscarriage of justice as they have been delayed in striking out the 1st and 2nd defendants' defences. The defendants contended otherwise arguing that there is no miscarriage of justice since the plaintiff could still have their application for judgment heard and the delay caused to the plaintiff could be compensated by cost. Weighing the situation, I am more incline to agree that the delay caused by the defendants has not so seriously prejudiced the plaintiff which is irreparable and which cannot be reasonably compensated by cost.

Conclusion

[24] For the foregoing grounds, I set aside the order of the learned deputy registrar and allow the defendants' application (encl. 135) on varied terms ie, that the impugned affidavit in opposition that has been filed and served be deemed to have been regularly filed and served and by consent the plaintiff be given one month from today's order to file and serve the affidavit in reply. In the interest of justice, I further order the defendants do forthwith pay the plaintiff RM1,000 costs for the delay occasioned by them.